MICHIGAN SUPREME COURT

PUBLIC HEARING
May 11, 2011

CHIEF JUSTICE YOUNG: Good morning. This is the public hearing on the - a number of pending administrative matters. I want to say that Justice Kelly is not with us this morning, her mother has taken ill so we send her and her mother our prayers and condolences and hope for a speedy recovery. Let me see. The first matter is Item 1 - 2008-18, there are no speakers signed up for that matter. Item 2 is 2008-28 - proposed amendment of Rule 6.005 of our rules and there is one person to speak to the - the matter concerns whether to adopt an amendment of 6.005 which could clarify that defense counsel in criminal proceedings must either file a substantive response to a prosecutor's application for interlocutory appeal or notify the Court of Appeals that the lawyer intends not to submit a pleading. Mr. Baughman is here to speak to this.

ITEM 2: 2008-28 - MCR 6.005

MR. BAUGHMAN: Good morning.

CHIEF JUSTICE YOUNG: Good morning.

MR. BAUGHMAN: My brief remarks are mainly aimed at both encouraging the Court to adopt the rule and encouraging it to tweak it a little bit so that the rule does not apply only to appointed counsel but to retained counsel as well. The point made in the rule I think is one that goes to the fact that there's a constitutionally based rule of performance for defense counsel in criminal cases, and so we should include both. I also have added my own little invention to the - to the rule that - for the Court to consider and it may need to be published separately that this rule concerns the duties of counsel, but we frequently run into a problem when appellate counsel is preparing their brief that they can't get the discovery materials that were provided at trial for the appeal. I know the State Appellate Defender is very diligent in trying to do that among others before they come to us for a second discovery and they frequently are either told I don't have the trial anymore or their calls aren't returned. And I think it would be good to have in this rule that trial counsel has the responsibility, which I think is (inaudible) in any event, to

turn over the file or allow it to be copied upon request of the appellate attorney for defense counsel.

CHIEF JUSTICE YOUNG: I think that last one is outside the scope of this particular rule isn't it?

MR. BAUGHMAN: I think it fits within the duties of counsel. But, again, it's not within the scope of your proposed amendment so it may need a separate - a separate publication. But I thought I'd take a whack at it (inaudible) -

CHIEF JUSTICE YOUNG: You haven't been shy about suggesting tweaks.

MR. BAUGHMAN: No, but you gotta take a chance when you have a chance.

CHIEF JUSTICE YOUNG: I gotcha - I hear ya.

MR. BAUGHMAN: Thank you very much.

CHIEF JUSTICE YOUNG: Thank you very much. There being no other people speaking to this we'll move on Item 3, 2009-20 - Proposed amendments of Rule 3 of the rules concerning the State Bar of Michigan and Rule 8 of the bar - Board of Law Examiners, there being no speaker signed up we'll move on to Item 4 - which is 2000-9 - 2009-29 - Proposed amendment of Rule 5.208. Again, there are no speakers signed up so we'll move on to Item 5 which is 2010-05 - Proposed amendments to Rules 2.112, 7.206, and 7.213 and the proposal is to amend those rules to revise the filing requirements that (inaudible) Headlee actions as recommended by the Legislative Commission on Statutory Mandates and whether to adopt an additional one that would clarify the prioritization of cases in the Court of Appeals. We have four people who wish to speak to this administrative proposal the first being Mr. Dennis Pollard.

ITEM 5: 2010-05 - MCR 2.112 etc. Headlee Actions

MR. POLLARD: Good morning, your honors. Dennis Pollard. I'm a member of the Legislative Commission on Statutory Mandates. I was appointed by the speaker - the speaker of the house and the senate majority leader, and I serve with five people - four of whom are here today - four of the members are behind me. And I'm speaking on the Commission's behalf. Given the limitations on time we will rely primarily upon the letter that we - the Commission sent to you on February 3, 2011. But I

do have a couple of comments about the Commission and what we perceive to be what would be achieved through these changes to the court rules. We were given direction - and we understood the direction to be from the Legislature and we were given instruction in 2007 - October 2007 to examine over a two-year period the state's compliance or lack of compliance with the Headlee Amendment, particularly §29, and to render a report as to what we found. And we did that and, in fact, we sent a copy of that report to the Court I think back in 2009 - the report is dated December 31, 2009 and it's very comprehensive. It includes some changes to the legislation and there are four bills, in fact, that are pending as we speak before the house government operations committee - HB 4038 through 4041 - which have to do with reforms. And I won't have the time to get into those, but they're I think very important to try to get the state into compliance because our finding in general was that the state is well out of compliance with the obligation to fund those things that it mandates local units of government to do. I (inaudible) the core idea of the Headlee Amendment when it was passed in 1978 and it has been routinely ignored and that was - that's the Commission's report and it deals with that fact and then it deals with some reforms. As pertains to this Court, we understood that we were to look at the judicial proceedings also because §32 of the Headlee Amendment puts the requirement on the Court of Appeals to enforce the Amendment - those are the words - to enforce. And so the first question that came up, and I argued the case, was in the *Durant* case it was a dilemma of how does the Court of Appeals - which is an appellate court of course - how does it deal with where it has original jurisdiction and are disputes of fact. This Court directed myself and the Assistant Attorney General in the case to submit briefs on that issue and in the decision reached by the Court in 1985 *Durant*, 424 Mich 364, this is what this Court said. "Where there are disputed facts as there are in *Durant*, the provisions in the RJA and the court rules allow the use of fact-finders as special masters who would report their findings to the Court of Appeals. We remand *Durant* to the Court of Appeals for further proceedings consistent with this opinion." And as a consequence of that Judge George Deneweth was appointed as the fact-finder and we proceeded from that point forward reaching a result in 1997 and because there was additional fact-finding. But the point is, that that's - that ruling about using a special master has been consistently followed since that decision.

CHIEF JUSTICE YOUNG: Have you had occasion to consider whether that is a - consistent with the constitutional

requirement that there not be delegation - judicial delegation to a nonjudicial officer?

MR. POLLARD: Yes, your honor, because what the - the point of the special master is that it does not make the decision. The special master's purpose is make - is to hear the evidence and make a report to the Court of Appeals. The actual decision - and these are record proceedings - so the actual decision is made by the Court of Appeals. So that's how we've satisfied that issue. And that was a point - one of the points of argument so the Court - this Court was apparently convinced of that argument. That was the - that was the argument that I had made at the time. So that procedure has been consistently followed and, in fact, to - even today I have two cases that are pending where there's a special master who is being called upon to resolve the issues in the case. And let me point out that the -

CHIEF JUSTICE YOUNG: You should be concluding your remarks.

MR. POLLARD: Okay. All right. Well, but all I can say is that the idea was - of the Commission was that through the reforms that we put - I should say the revisions to the court rules - was to expedite the process to make it easier for the taxpayers of the state who have a cause of action under §32 to bring a suit and have it adjudicated in a prompt fashion and that this will contribute to that objective. So we - we submit that it does.

JUSTICE MARKMAN: Mr. Pollard? Could you please tell me how the differences that were reflected on this Court in *Adair VI* - 4 to 3 decision - one I think you were involved in.

MR. POLLARD: Yes.

JUSTICE MARKMAN: How are they implicated in the proposed reforms? I mean what would judges who were divided on that issue feel about the proposed reforms? How would they feel differently about the proposed reforms in your - in your judgment?

MR. POLLARD: In my judgment, I don't think it would have any impact. I think the - the reforms really deal with how you begin the process and you expedite the proceeding. When this Court decided the *Adair* decision, that was the - at a terminal point of the case although it -

CHIEF JUSTICE YOUNG: But it does implicate the burden of proof in certain kinds of -

MR. POLLARD: Right.

CHIEF JUSTICE YOUNG: Headlee claims.

MR. POLLARD: No, that's correct. And it - but that would be in future cases the burden of proof issue was resolved in that case, and we then move forward. Now we're into the attorney fee issue which is a different issue.

JUSTICE MARKMAN: I thought one of the differences in *Adair* was the difference concerning just how focused the pleading had to be in terms of demonstrating that certain conditions exited. Aren't you pretty much proposing rules here that would be much more compatible with the majority view in that case?

MR. POLLARD: Well, your honor, I don't even - I don't believe that that was - you could infer that from the majority opinion. I don't think the -

JUSTICE MARKMAN: Well, how would you articulate what did divide the Court in that case?

MR. POLLARD: You're speaking of *Adair* from last summer?

JUSTICE MARKMAN: 2010 I think it was.

MR. POLLARD: Well, there was, for example, on the question of the burden of proof there was a dispute there - I should say a disagreement on the Court. There was no comment with respect to the attorney fees which is the other major issue in the case. I don't see how these rule changes would impact that - those issues. I don't think that they do.

JUSTICE MARKMAN: Thank you.

CHIEF JUSTICE YOUNG: Thank you very much.

MR. POLLARD: Thank you.

CHIEF JUSTICE YOUNG: David Martell.

MR. MARTELL: Good morning. My name is David Martell, I'm an Executive Director of Michigan School Business Officials.

This is an association representing about 2,000 members made up of school finance directors, facility directors, technology directors - basically, the business side of the schools - the nonacademic side - and we provide support to our members through professional development products and services, and other ways that we can try to help them better serve the children that we all serve. And today I'm here to support what Mr. Pollard was discussing, and request that the Court adopt the reforms to the judicial process related to the state's violations of the constitutional prohibition on unfunded mandates and how they're remedied. The current core process is served to reward the state's violations since the only way for local units of government including schools to obtain relief is a judicial declaration where the violation occurs. And based on past history with *Durant* and *Adair*, these cases frequently take quite a bit of time to get through the process - years and years. The only penalty to the state in these processes is they can delay when they first have to comply with the rules and the Constitution. And, basically, with no accountability to the local units for the cost that we've been incurring over the years until the decision is rendered. The requirements of §29 of Headlee, as I understand it and I'm not an expert in law, but it's a - it's not a complex concept contained in an obscure part of the Constitution, it's a clear and unambiguous expression of the will of the People of Michigan to -

CHIEF JUSTICE YOUNG: I beg to differ, sir.

MR. MARTELL: I'm sorry?

CHIEF JUSTICE YOUNG: These are very complex questions. And I guess I would ask you why is it a burden on you who has suffered - who is alleging that you suffered a harm to say which part, whether it's a prohibition on unfunded mandates or some other violation that you uniquely know, to say that you're bleeding. Why is that a burden?

MR. MARTELL: Well, I've seen what it's done to school districts, and that's the (inaudible) I'm representing here.

CHIEF JUSTICE YOUNG: You're saying that you don't know what your violation is that you're alleging - to file a complaint. You don't know.

MR. MARTELL: I'm sorry - you're -

CHIEF JUSTICE YOUNG: When you claim that you've suffered a violation under Headlee, you know what that violation is, right?

MR. MARTELL: Yes.

CHIEF JUSTICE YOUNG: Then why is it an additional burden for you to tell the court in your complaint we are filing a complaint to vindicate the prohibition on unfunded mandates and to explain what that violation is.

MR. MARTELL: I don't think that's a problem. I think that's -

CHIEF JUSTICE YOUNG: That's all the rule currently requires you to do.

MR. MARTELL: The problem - the problem is that it takes - just like the *Durant* case it took 17 years, for it to go through the process. And what we're supporting -

CHIEF JUSTICE YOUNG: Well, what of - let's just focus you on one of the issues. I understand the delay. But one of the complaints - or one of the challenges of the Commission is that the specific pleading rule that was put into place to force parties alleging a Headlee violation to tell the court what Headlee violation they were complaining of and what supported that claim. Does that strike you as being something beyond the capacity of a complainant under Headlee?

MR. MARTELL: No, sir. But I -

CHIEF JUSTICE YOUNG: The delay issue is a - is one that has to do with how long it takes to sort out the facts in one of these things in an appellate court which is not really very well designed to do trial - essentially trial litigation.

MR. MARTELL: Um hmm.

CHIEF JUSTICE YOUNG: Unfortunately, as you say, the People chose to place the responsibility in the first instance for doing that litigation in the Court of Appeals.

MR. MARTELL: And as I understand it, that Court of Appeals placement is to expedite the process of getting through. I don't think -

CHIEF JUSTICE YOUNG: But it's not well designed to do that that's the problem.

MR. MARTELL: Okay. Well, I can accept that from my standpoint because I'm not a detailed person in a lot of these proceedings. I'm basically here to provide support to expediting the process from -

CHIEF JUSTICE YOUNG: Okay.

MR. MARTELL: you know so that it doesn't - you know school districts are not paying for mandates over a 15 or 5 or 10-year period when it's - the state is not you know standing up to their end of the deal. And so that's where I see the problem becoming.

CHIEF JUSTICE YOUNG: Okay.

JUSTICE MARKMAN: Well, Mr. Martell can I ask you a kind of a - stepping back from the trees to look at the forest kind of question here. Mr. Pollard indicated that the Headlee Amendment, and I think we all are aware of this, was enacted to protect taxpayer interests. You, in essence, are speaking for the tax consuming interest it seems to me. What are taxpayer group organizations think about these changes and if they disagree with you why do they disagree with you?

MR. MARTELL: I really don't know if they have any opinions on these changes. They seem a pretty straightforward request to me from a standpoint of - I don't know that anybody believes that 17 years to - to force the state to live up to their obligations under Headlee is a timely response. And so I really can't speak to them, but I can speak to what it - it's meant to school districts who - who had to pay for those costs over that period of time and while there was a settlement at the time it didn't come anywhere near close to covering that 17 years worth of extra cost that the schools were required to - to endure and at the cost of being able to spend those in the classroom.

JUSTICE MARKMAN: But I think there's a debate whether the gravamen of Headlee is to prohibit unfunded mandates or to require the funding of such mandates. And I think there's a very big distinction in terms of the interests of the taxpayer and the tax consumer, and I'm just wondering if you've given any thought to those implications at all.

MR. MARTELL: Well, certainly, our focus on implications to the children that we serve and I believe many of the taxpayers have children in schools or grandchildren in schools and so when - when the people spoke in that constitutional amendment whether or not they believe it now, that those are rules that schools have to comply with that are in this Constitution, but the states should also have to require - be required to follow their own rules that are placed on them otherwise I don't know what our Constitution does for us as individuals. If the - if the state doesn't have to follow the rules that the People vote in, I guess I have a hard time understanding why that would be supported.

CHIEF JUSTICE YOUNG: Thank you.

MR. MARTELL: Okay. So I'll just close out because I know I'm over time. Let - just on behalf of the K-12 schools in Michigan and the children we serve, we do request that the Court adopt the Commission's recommendations for the changes in the court rules so thank you very much.

CHIEF JUSTICE YOUNG: Thank you. Timothy Haynes.

MR. HAYNES: Good morning. My name is Timothy Haynes, I'm an Assistant Attorney General, and I'm here on behalf of Attorney General Bill Schuette. The Legislative Commission's proposed elimination of the fact-specific pleading, briefing, and preliminary hearing requirements currently reflected in MCR 2.112(n) and MCR 7.206(d) is inconsistent with the reasoning and goals of this Court's prior decisions that encourage expedited judicial decision-making and resolution in order to avoid protracted litigation that results in potential harm to taxpayers both at the local level and the state level. It represents, in our opinion, a step backwards in Headlee litigation. The return to generalized notice pleading and removal of the requirements will require the parties to determine the exact nature of the claim and the type and extent of harm alleged in a Headlee case through discovery. This will delay resolution, increase the cost of suits, and ultimately result in additional cost to taxpayers. And these proposed amendments will make it difficult for the Court of Appeals to grant relief at the preliminary hearing stage as is currently allowed under the current rules. With regard to the proposal regarding special master, I'd simply note that MCR 7.206(d)(3) and MCL 600.308a(5) currently authorize the Court of Appeals to refer matters to the circuit court or to the Tax Tribunal where there are disputed facts in order to pursue that role. And, in

fact, in one of the cases that Mr. Pollard mentioned that is what happened. The special master is actually an Oakland County circuit court judge - sitting judge. While the proposed rule would allow the Court of Appeals panel to act without a special master where there are only - where there are no factual disputes and solely questions of law, the fact that they're removing - also proposing to remove the fact-specific pleading requirements will make it difficult for the Court of Appeals to make such a determination. And I think that was what's reflected in a lot of the comments to when these fact-specific pleadings -

CHIEF JUSTICE YOUNG: Have you been involved in a Headlee litigation at the Court of Appeals level?

MR. HAYNES: I have been involved only in the Supreme Court level at this particular time for (inaudible) -

CHIEF JUSTICE YOUNG: Do you have any idea why it takes more time than perhaps we expect to litigate these cases at that level?

MR. HAYNES: In my opinion, it is because the nature of the activity isn't properly defined upfront which allows it to be analyzed in detail. It seems to me, as this Court has noted, that once the activity is identified by the local unit of government or the taxpayer, it's simply an application of what existing laws were in place at the time of the Headlee Amendment and how did that change. And then measuring whether - how that activity changed. And, in this case, it is that stage of the proceedings that typically takes the most time.

CHIEF JUSTICE YOUNG: To clarify what the claim is.

MR. HAYNES: To clarify what the activity and the increased level of activity or service that is (inaudible).

JUSTICE MARKMAN: How do you respond to the concern of the Commission though that the special pleading requirements that we have with regard to Headlee may give rise to the perception that this Court's making taxpayer claims under the Headlee Amendment more burdensome and more difficult to initiate than any other ordinary civil claim?

MR. HAYNES: Well, if you - if you use that broad of a statement you know it appears that way, but these aren't your typical litigation case - these are complex cases. They often

involve a lot of legal arguments, but I don't think that - that it can be said that the People - that the attorney generals who've represented the state in these cases have acted to delay proceedings. Their attempts have been to get judicial determinations at very preliminary stages through either motions for summary disposition. We've been successful in our responses to complaints in the briefs in response to complaints it (inaudible) reported to resolve these issues through the preliminary hearing process which is currently in the rule.

CHIEF JUSTICE YOUNG: Conclude your remarks.

MR. HAYNES: Thank you. Our comments about the special master proposals as it is written are in - are in our written comment. We believe that another issue with that would be handling of dispositive motions once it's referred that the rules should address how dispositive motions will proceed once it's been referred to a special master if the Court is inclined to go that way. But Attorney General Schuette and the state agencies that are required to defend against these complex Headlee Amendment actions consistent with the comments provided by the Court of Appeals rules committee and the State Bar executive committee asks that we oppose these proposed amendments. Thank you.

CHIEF JUSTICE YOUNG: Thank you. Mr. Bill McMaster. He isn't here. Those being the only people signed up for the - to comment on administrative matter 2010-05 we will move on to the next one if I can find my - (inaudible) my sheet. Item 6 - would have been ADM 2010-18 and proposals to change the pro bono rules. I've - I've heard from both Justice Marilyn Kelly and Justice Markman that they wish to pass this matter to the next administrative conference. I believe that concludes all of the matters before us on the public hearing, is that correct? Good.

JUSTICE MARKMAN: Well, can I - can I just emphasize I'm happy to pass in order to accommodate Justice Kelly who is not here today, otherwise, I would hope that we would deal with this in due course.

CHIEF JUSTICE YOUNG: Yes, it will be place on the next public administrative agenda. As there being no further business before the public agenda - public meeting, we are adjourned. Thank you.